

1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

DAVID N. MAKOUS, SB# 082409

2 E-Mail: makous@lbbslaw.com

DANIEL C. DECARLO, SB# 160307

3 E-Mail: decarlo@lbbslaw.com

MINA I. HAMILTON, SB# 213917

4 E-Mail: hamilton@lbbslaw.com

221 North Figueroa Street, Suite 1200

5 Los Angeles, California 90012

Telephone: 213.250.1800

6 Facsimile: 213.250.7900

7 *Attorneys for Plaintiffs*

TRAFFICSCHOOL.COM, INC. and

8 DRIVERS ED DIRECT, LLC

9 **UNITED STATES DISTRICT COURT**

10 **CENTRAL DISTRICT OF CALIFORNIA**

11
12 TRAFFICSCHOOL.COM, INC., a
13 California corporation; DRIVERS ED
14 DIRECT, LLC, a California limited
liability company,

15 Plaintiffs,

16 vs.

17 EDRIVER, INC., ONLINE GURU,
18 INC., FIND MY SPECIALIST, INC.,
and SERIOUSNET, INC., California
19 corporations; RAVI K. LAHOTI, RAJ
LAHOTI, individuals,

20 Defendants.

CASE NO. CV 06-7561 PA (CWx)
The Hon. Percy Anderson

**PLAINTIFFS' EVIDENTIARY
OBJECTIONS AND MOTION TO
STRIKE DECLARATION OF
KATHRYN CATHERWOOD IN
SUPPORT OF DEFENDANTS'
COMMENTS TO JOINT STATEMENT
OF FEES AND COSTS**

Date: December 5, 2011

Time: 1:30 p.m.

Crtrm.: 15

Complaint Filed: November 28, 2006

21
22
23
24
25
26 Plaintiffs TRAFFICSCHOOL.COM, INC. and DRIVERS ED DIRECT, LLC
27 hereby object to and move to strike the Declaration of Ms. Kathryn Catherwood
28 including exhibits thereto as set forth below.

Defendants have submitted a Declaration of Ms. Catherwood, one of the partners in the firm Foley Lardner, and someone who also is now acting as counsel of record for Defendants, as their self-designated “expert” on attorney fees.

Under the requirements of the Federal Rules of Evidence Rule 702 and the gatekeeper function of the well-recognized cases of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 592 (1993) and Kumho Tire Co., Ltd. v. Carmichael, 526 US 137, 148-149 (1999), her testimony should be disregarded. The reasons are self-evident as she provided no evidence that she possesses the requisite “specialized knowledge to assist the trier of fact”, and the “knowledge, skill, experience, training or education” to opine as an expert in this matter, for the following reasons:

- She is an admitted bankruptcy court practitioner, which is irrelevant;
- She failed to lay any foundation for any qualifications concerning any familiarity with the Lanham Act or a false advertising case;
- She failed to identify any other prior matter in which she acted at all;
- She did not review the sizable court and litigation record spanning the last 5 years in this case and its myriad pleadings, discovery, expert reports, motions, rulings, trial findings and record, injunctions, and the appeal, or any of the statutes and cases at issue, and she admits as much in Paragraph 4 where she stated “*particularly given my lack of familiarity with the underlying litigation*”;
- She uses a self-proclaimed “mathematical approach” (Paragraph 6 – “H”) with no legal support or precedent.

Simply put it is plain that Ms. Catherwood fails to provide the basic foundation necessary to receive the testimony of any witness (lay or expert) under FRE 602 and 701) and falls remarkably short of the high standard required by FRE 703 because her testimony is not:

1 “ (1)...based upon sufficient facts or data, (2)... the product of reliable
 2 principles and methods, and (3)...[the result of application of]
 3 principles and methods reliably to the facts of the case” .

4 In essence her “opinions” are no more than “junk science” and not competent
 5 admissible evidence, and such is regularly and necessarily rejected by the Courts.

6 **SPECIFIC OBJECTIONS**

7 In addition to general objection to the entirety of Ms. Catherwood’s
 8 declaration for the reasons stated above, Plaintiffs more specifically object as
 9 follows:

10 **1. Page 2, Lines 4 – 9:**

11 “However, my experience includes over 20 years of practicing before state
 12 and federal courts, including in bankruptcy court with extensive experience in
 13 reviewing and assessing reasonableness of fees and costs incurred in cases with
 14 statutory rights to attorneys fees. I have been involved in both preparing fee
 15 applications in bankruptcy court and objecting to fee applications by other
 16 professionals employed in bankruptcy cases.”

17 Objection: Irrelevant. Lacks foundation. FRE 401-403, 602.

18 Sustain: _____ Overrule: _____

20 **2. Page 2, Line 21 – Page 3, Line 4:**

21 “I began undertaking the task of reviewing the excel spreadsheet provided to
 22 my partner, Andrew Serwin, by Plaintiff’s counsel even before the Court issued its
 23 order and believe that the Court will find my analysis helpful and instructive.
 24 Although Attorney Tammy Boggs of our office requested via e-mail that Attorney
 25 Hamilton provide us with the most recent version of the excel spread sheet. This
 26 request was declined. Therefore, I have reviewed what I believe to be the most
 27 recent version provided to us in excel format and in the event it differs from what
 28 was filed with the Court, I request an opportunity to respond to any inconsistencies

1 in the two versions, although I understand that no changes were made after receiving
2 Defendants' comments other than adding in Plaintiffs responses to such comments."

3 Objection: Irrelevant. Lacks foundation. Hearsay. Improper opinion
4 testimony. FRE 401-403, 602, 701-703, 801-802.

5 Sustain: _____ Overrule: _____

6
7 **3. Page 3, Lines 5-22:**

8 "In reviewing the descriptions contained in Plaintiffs' excel spreadsheet, I
9 preliminarily note for the Court that there were several entries that did, in fact
10 reference section 17200, et seq., including as follows:

11 "Review new California authority on B &P section 17204 re standing in
12 California." (Doc. No. 315 at p. 237)

13 "Reviewed B. Daucher 'Proposal' re 17500 and discussed responses with D.
14 DeCarlo.: (Doc. No. 315 at p. 239)

15 "Research Attorney Fee Awards under private attorney general statute." (Doc.
16 No. 315 at p. 306)

17 "Research Request for: Mina Hamilton. Request: Search for model jury
18 instructions regarding false advertising in any Federal Court or CA State Court
19 under Bus. & Prof. Code. . ." (Doc. No. 315 at p. 234)

20 Therefore it appears that the statement that it was impossible to allocate the
21 time between non-Lanham Act and Lanham Act claims is not completely accurate. I
22 also noted random time entries such as "client lunch" for 3.0 hours at \$780 (Doc.
23 No. 315 at p. 299); "meeting with client at lunch (no charge)" for 1.5 hours at \$675
24 (Doc. No. 315 at p. 349) that are not compensable at all, and the no charge to client
25 is nonetheless included in the request before this Court.

26 Objection: Irrelevant. Lacks foundation. Hearsay. Improper opinion
27 testimony. FRE 401-403, 602, 701-703, 801-802.

28 Sustain: _____ Overrule: _____

1 **4. Page 3, Line 23 – Page 4, Line 4, Exhibit 1:**

2 “Although extremely difficult and time consuming, and particularly given my
3 lack of familiarity with the underlying litigation, I believe that my analysis
4 contained in the Supplemental Joint Statement on Fees, filed concurrently herewith,
5 will provide guidance to the Court, to the extent the Court believes that any fees or
6 costs should be shifted to Defendants. I have attached to this declaration as Exhibit 1
7 the last page of each tab of the excel spread sheet contained in the Supplemental
8 Joint Statement on Fees which contains the total in reduced hours and corresponding
9 reduced fees proposed by Defendants taking into account the proffered objections to
10 each line item of time.”

11 Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE
12 401-403, 602, 701-703.

13 Sustain: _____

Overrule: _____

14
15 **5. Page 4, Lines 5-8, Exhibit 2:**

16 “I also reviewed the Joint Statement on Costs and have provided Defendants’
17 position with respect to the requested costs on a Supplemental Joint Statement on
18 Costs filed concurrently herewith, a copy of the last page showing the total reduced
19 costs is attached hereto as Exhibit 2.”

20 Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE
21 401-403, 602, 701-703.

22 Sustain: _____

Overrule: _____

23
24 **6. Page 4, Lines 14-21:**

25 “‘A’: This designation objects to the services because they appear to relate to
26 administrative tasks, clerical tasks or tasks that could have and should have been
27 done by someone of a lower billing rate than a partner. The fact that there were a
28 number of entries with this designation appears to support a conclusion that little

1 consideration was made as to whether a person at a lower billing rate should have
 2 performed the task. Therefore, Defendants request that this Court should consider
 3 this and deny any multiplier be added to any lodestar calculation.”

4 Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE
 5 401-403, 602, 701-703. See Response to Defendants’ “Coded” Designations, Exh.
 6 B.

7 Sustain: _____ Overrule: _____

8
 9 **7. Page 4, Line 22 – Page 5, Line 4:**

10 “B’: This designation was used to indicate that the request for these costs
 11 appear to have been submitted to this Court before in connection with Plaintiffs’
 12 request for costs filed on September 10, 2008 (Doc. No. 217), including the time
 13 incurred by the expert witnesses, Mr. Maronick, whose invoice was attached to the
 14 prior cost statement. There is no explanation in Ms. Hamilton’s declaration that
 15 these were previously denied and based on a review of the order (Doc. No. 255)
 16 filed on September 25, 2008, it is not clear which costs were approved and paid by
 17 Defendants and which were denied. Therefore, without further explanation as to the
 18 why the expert’s time is reasonable, the Court should deny the request.”

19 Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE
 20 401-403, 602, 701-703. See Response to Defendants’ “Coded” Designations, Exh.
 21 C.

22 Sustain: _____ Overrule: _____

23
 24 **8. Page 5, Lines 5-16:**

25 “D’: This designation objects to services that were duplicative, including
 26 where it appeared that there were several attorneys, sometimes several partners,
 27 working on the very same issues. The fact that there were a number of entries with
 28 this designation appears to support a conclusion that little consideration was made as

1 to whether a task truly required 3 or 4 partners addressing the same issue. For
 2 example, in the tab for estimated fees for preparing and responding to the fee
 3 request, there were several people listed who would be working on the request. In
 4 my experience, a fee application is not so complex as to require 3-4 partners
 5 spending time but that the bulk of the work can and should be done by a paralegal at
 6 a much reduced rate. Therefore, Defendants request that this Court should consider
 7 this and deny any multiplier be added to any lodestar calculation.”

8 Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE
 9 401-403, 602, 701-703. See Response to Defendants’ “Coded” Designations, Exh.
 10 D.

11 Sustain: _____ Overrule: _____

12
 13 **9. Page 5, Lines 17-20:**

14 “E’: This designation objects to services that appear to be excessive in
 15 nature, including charging for travel time, and taking too much time with multiple
 16 reviewers on a particular document or spending too much time completing a task.”

17 Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE
 18 401-403, 602, 701-703. See Response to Defendants’ “Coded” Designations, Exh.
 19 E.

20 Sustain: _____ Overrule: _____

21
 22 **10. Page 5, Line 21 – Page 6, Line 18:**

23 “H’: This designation attempts to address the requirement in the U.S.
 24 Supreme Court case of Hensley v. Echerhart, 76 L.Ed. 2d 40 (1982) and the Ninth
 25 Circuit cases relying on this case which states that the most critical factor in
 26 determining reasonableness is the degree of success obtained. Considering all
 27 factors, in this case I employed a partial “mathematical approach” in my review
 28 given that Plaintiffs prosecuted two causes of action, one under the Lanham Act

(where Plaintiffs were found to have suffered no damages and the injunction was found by the Ninth Circuit to be a barrier to First Amendment protected content) and one under the California Business & Professions Code section 17200 (where Plaintiffs' claims were completely denied), by reducing the request by 50% given the limited degree of success as discussed in Defendants' Opposition to Plaintiffs' Motion for Attorneys' Fees and Costs. Given Plaintiffs' failure to make any effort to allocate, I have undertaken to allocate based upon the 50% reduction as I have seen done in published decisions, some of which I have cited in our brief filed concurrently herewith. Given the two causes of action, and the fact that Plaintiffs sought monetary damages on both causes of action and were denied such damages on both causes of action, a 50% reduction is generous. I base this assumption on the judgment that denied relief on the Second Cause of Action, this Court has already confirmed that the two causes of action did have different elements of proof justifying denying one and awarding an injunction on the other. I also base this upon, among other things, the fact that the pleadings, such as Plaintiffs' Memorandum of Contentions of Fact and Law were devoted approximately 50-50 to each cause of action."

Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE 401-403, 602, 701-703. See Response to Defendants' "Coded" Designations, Exh. F.

Sustain: _____

Overrule: _____

11. Page 6, Lines 19-24:

"'L': This designation objects to services where the time is "lumped" together within the description itself and the description contains time that although may have related to compensable services, cannot be parsed out from the time devoted to non-compensable (e.g. Non Lanham Act or unsuccessful) claims. Therefore, the entire entry is tainted and all the time should be disallowed."

Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE 401-403, 602, 701-703. See Response to Defendants' "Coded" Designations, Exh. G.

Sustain: _____

Overrule: _____

12. Page 6, Lines 25-27:

"NL": This designation objects to services that appear to relate to Non-Lanham Act claims or unsuccessful claims where Plaintiffs' were not the prevailing party."

Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE 401-403, 602, 701-703. See Response to Defendants' "Coded" Designations, Exh. H.

Sustain: _____

Overrule: _____

13. Page 7, Lines 1-9:

"NP": This designation objects to services that appear to relate to matters where Plaintiffs were not the prevailing parties. For example, Plaintiffs sought compensation for time spent on their post-judgment motion for contempt regarding the injunction. Plaintiffs lost this motion. Because the motion was brought after judgment, the cases relied upon by Plaintiffs in their brief at page 17 (Gates v. Deukmejian, 987 F.2d 1392(9th Cir. 1992)), that a litigant need not prevail on every claim, is not applicable because the case had concluded to judgment and this was a post trial motion to enforce, and was both unrelated to prosecuting the Lanham Act claim and unsuccessful."

Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE 401-403, 602, 701-703. See Response to Defendants' "Coded" Designations, Exh. I.

Sustain: _____

Overrule: _____

14. Page 7, Lines 10-24:

“‘R’: This designation objects to time entries that contained redactions which prevent any analysis as to the reasonableness of the undisclosed work. Given Plaintiffs’ failed to make any effort to identify whether a particular entry related solely to a Lanham Act claim the Defendants request that the Court deny the time where the redactions render it impossible to determine reasonableness because it was Plaintiffs’ burden in its opening brief to establish sufficient facts to allow for a finding of reasonableness. It also appears that the redacted entries may relate to discussions that focused on Plaintiff’s pecuniary interests and efforts at personal gain which would not be compensable. The evidence before the court does not allow a person reviewing the descriptions to assess the reasonableness and therefore Defendants request the time be denied in full. Although this Court’s August Order did allow Plaintiffs to redact entries, they do this at their own risk if the redactions are so excessive as to gut the ability to determine reasonableness or the compensable nature of the time incurred.”

Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE 401-403, 602, 701-703. See Response to Defendants’ “Coded” Designations, Exh. J.

Sustain: _____ Overrule: _____

15. Page 7, Line 25 – Page 8, Line 2:

“‘V’: This designation objects to time entries that are so vague (e.g. ‘conference with client’) that it is impossible to assess reasonableness or whether it relates to a Lanham Act or Non-Lanham Act claim or a successful claim where Plaintiffs can argue they were the prevailing party. Therefore, Defendants request that the time be denied in full.”

Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE 401-403, 602, 701-703. See Response to Defendants’ “Coded” Designations, Exh. K.

Sustain: _____

Overrule: _____

16. Page 8, Lines 3-8:

“‘no charge’: This designation identifies entries that the Plaintiffs state they did not charge their client. Given that Plaintiffs redacted the last page of each invoice that presumably showed what they actually charged their clients, it is impossible to tell what was actually charged and Defendants request that the Court give the benefit to Defendants on this point and deny the attorneys’ fees.”

Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE 401-403, 602, 701-703. See Response to Defendants’ “Coded” Designations, Exh. L.

Sustain: _____

Overrule: _____

17. Page 8, Lines 9-21:

“As seen on Exhibit 1, after discounting for non-Lanham Act services_(R and H) the number of hours spent and rates charged for each “tab” in the Excel spreadsheet was as follows:

	Reduced Fees	Reduced Hours
Pleadings:	\$ 20,338.25	83.95
Discovery	\$62,301.00	235.40
Summary Judgment	\$37,946.75	160.35
Pre-Trial	\$54,899.25	225.85
Trial through Post Judgment	\$39,364.25	225.85
Contempt	\$0.00	0
Attorneys Fees	\$18,980.00	73
Joint Status Report	\$3,600.00	8
Total Fees	\$237,429.50	1012.4”

1 Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE
2 401-403, 602, 701-703.

3 | Sustain: _____ Overrule: _____

5 | **18. Page 9, Lines 1-3:**

6 “In addition, I noted many entries that warranted an “A” designation not
7 accounted for in the above and below a further across the board discount of 10% (or
8 \$23,742.95) for total possible award of \$213,686.55.”

9 Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE
10 401-403, 602, 701-703.

11 || Sustain: _____ Overrule: _____

13 | 19. Page 9, Line 4:

14 “As seen on Exhibit 2, the costs should be reduced to \$29.85.”

15 Objection: Irrelevant. Lacks foundation. Improper opinion testimony. FRE
16 401-403, 602, 701-703.

17 Sustain: _____ Overrule: _____

19 Plaintiffs respectfully request that the Court sustain Plaintiffs' objections and
20 strike the Declaration of Kathryn Catherwood and exhibits thereto.

22 DATED: November 21, 2011 LEWIS BRISBOIS BISGAARD & SMITH LLP

25 By: /s/ Mina I. Hamilton
26 Mina I. Hamilton
27 *Attorneys for Plaintiffs*
TRAFFICSCHOOL.COM, INC. and
DRIVERS ED DIRECT, LLC